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No. 07-723

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IN THE
SUPREME COURT OF THE UNITED STATES

SUPERVALU, INC.,
Petitioner,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* FOOD MARKETING INSTITUTE, INC. IN SUPPORT OF THE PETITION

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INTERESTS OF THE *AMICUS* [1]

The Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets, including both unionized and non-union companies. Its international membership includes 200 companies from more than 50 countries. SUPERVALU, Inc., the Petitioner in this case, is one of FMI's 1,500 members.

FMI is filing this *amicus* brief in support of the petition in order to alert the Court to the serious disruptive impact of the Third Circuit's decision on employers participating in multiemployer pension plans throughout the country. By reinterpreting the

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[1] Pursuant to Supreme Court Rule 37.2, the *Amicus* states that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date for any response. Pursuant to Supreme Court Rule 37.6, the *Amicus* further states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

"evade or avoid" provision of section 4212(c) of the Multiemployer Pension Plan Amendments Act of 1980, as amended (hereinafter "MPPAA") in such a way as to allow pension plans to disregard the terms of *bona fide*, arms-length collective bargaining agreements, the Third Circuit's ruling threatens to undermine the entire collective bargaining process. The Third Circuit's holding also will make it impossible for unionized employers to engage in prudent financial planning, which must frequently involve taking into account the potential impact of withdrawal liability on significant changes in business operations. Under the Third Circuit's holding, for an employer even to consider the potential impact of withdrawal liability in connection with a business restructuring will expose the employer to the risk that its actions will be disregarded by a multiemployer plan.

The Third Circuit's overbroad reading of Section 4212 is not compelled by the language of the statute and disrupts an established consensus of understandings in the business community, based upon judicial, arbitral, and legislative authority, as to the meaning of this important section of MPPAA. The decision creates a conflict between circuits that will cause tremendous uncertainty for the thousands of unionized employers who contribute to multiemployer pension plans. For each of these reasons, FMI as *amicus curiae* supports the petition. The petition should be granted on this issue of great public importance, so that this Court can review and resolve the conflict in the circuits regarding the meaning of Section 4212 of MPPAA.

SUMMARY OF ARGUMENT

The Third Circuit's novel interpretation of MPPAA, absent reversal by this Court, will dramatically and adversely impact large numbers of employers, employees, and pension plans. The Third Circuit has erroneously declared that any employer action that has a principal purpose of minimizing withdrawal liability under MPPAA should be disregarded by a multiemployer pension plan, *even if the action is the result of bona fide collective bargaining*. The impact of this decision on unionized employers will be staggering.

As further explained below, the Third Circuit's decision will undermine the collective bargaining process (which MPPAA was intended to strengthen), and will render employers helpless to plan or execute the most basic financial actions necessary to conduct business, because they will be unable to determine whether such actions will be subsequently disregarded under MPPAA. Ultimately, the Third Circuit's decision will lead to absurd results that will adversely affect the very plan beneficiaries who MPPAA was intended to protect.

The Third Circuit's holding, which conflicts with a decades-old judicial and legislative consensus, thus creates an issue of great public importance, as to which this Court's intervention is urgently required. For these reasons, the *Amicus* asks that the Court grant the petition and reverse the decision of the Third Circuit.

REASONS FOR GRANTING THE PETITION

I. THE PETITION'S CHALLENGE TO THE THIRD CIRCUIT'S APPLICATION OF THE "EVADE OR AVOID" PROVISION OF MPPAA PRESENTS AN ISSUE OF GREAT IMPORTANCE.

A. The Third Circuit's Erroneous Decision Will Undermine The Statutorily Mandated Collective Bargaining Process, In Direct Conflict With Prior Authority.

The issues presented by the petition affect thousands of employers, millions of employees, and the expenditure of billions of dollars. A recent survey indicates that 43% of multiemployer pension plans assessed withdrawal liability against contributing employers in 2006.[2] There are more than 1,500 multiemployer plans nationwide, to which 300,000 employers contribute on behalf of nearly 10 million employees.[3] As of 2005, total assets of such funds exceeded $400 billion.[4]

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[2] *See* Bulletin, Segal, Survey of Multiemployer Pension Plans' PPA '06 Funded Percentage and Projected Zone Status (Spring 2007), *available at* http://www.segalco.com.

[3] PENSION BENEFIT GUARANTY CORP., 2006 ANNUAL REPORT 18, *available at* http://www.pbgc.gov/about/annreports.html.

[4] *See* U.S. DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN ABSTRACT OF 2005 FORM 5500 ANNUAL REPORTS 9 (Dec. 2007).

The multiemployer pension plans that MPPAA was enacted to protect are entirely the product of collective bargaining between employers and unions under a process governed by a separate statute, the National Labor Relations Act, 29 U.S.C. § 151, *et seq*. Under that law, the obligation of an employer to contribute to a multiemployer pension plan arises exclusively from the duty to bargain imposed by 29 U.S.C. § 158(a)(5). *See Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F. 2d 491, 496 (9th Cir. 1987). *See also Trustees of Colorado Pipe Industry Pension Trust v. Howard Elec. & Mechanical Inc.*, 909 F.2d 1379, 1383-84 (10th Cir. 1990).

Indeed, absent a written agreement between an employer and the union representing the employer's employees, it is unlawful for an employer to make contributions to a multiemployer pension plan at all. *Cuyamaca Meats, supra*, at 498. *See also Trustees of Washington Area Carpenters' Pension and Retirement Fund v. Mergentime Corp.*, 743 F.Supp. 422, 425 (D. Md. 1990); *Denver Metropolitan Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3 & Pipefitters Local No. 208*, 586 F.2d 1367, 1369 (10th Cir. 1978). 29 U.S.C. § 302(c)(5). The decision to remain obligated to contribute to such a plan and the amount of such contributions is a mandatory subject of bargaining. *See Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). The rate and continuation of contributions is commonly negotiated between employers and unions as part of an

integrated collective bargaining process that takes into account the competing demands of employers and employees for changes in wages, benefits and working conditions.

The predominant role of the collective bargaining process in the determination of withdrawal liability is made explicit under MPPAA. Section 4203 (29 U.S.C. § 1383) defines a "complete withdrawal" from a multiemployer plan for purposes of assessing withdrawal liability by direct reference to an employer's permanent cessation of its "obligation to contribute under the plan." Such obligation to contribute is explicitly defined in Section 4212(a) of MPPAA as arising "under one or more collective bargaining agreements" or "as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a).

Prior to the Third Circuit's decision, no court had held that a multiemployer pension plan was authorized by MPPAA to require an employer to extend its obligation to contribute to the plan beyond the term agreed to between the employer and the union lawfully representing the employer's employees through the process of *bona fide* good faith collective bargaining. Directly to the contrary, the Ninth Circuit held in *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, supra*, that Section 4212(c) has no application to *bona fide* collective bargaining that results in termination of an employer's obligation to contribute to a plan. As the Ninth Circuit found, such bargaining does not constitute a "transaction" to evade or avoid liability

under Section 4212. To the same effect was the arbitration decision in *Int'l Typographical Union Negotiated Pension Plan and Ft. Worth Telegram*, 5 Empl. Benefits Cas. (BNA) 1193 (1984).[5]

These holdings, as well as that of the district court in the present case, are based upon the common sense view that collective bargaining to cease contributions to a plan cannot violate Section 4212(c), because such bargaining carries out the statutory mandate expressed in Sections 4203 and 4212(a), as discussed above.[6] By holding that a collectively bargained agreement to terminate the employer's obligation to contribute to a multiemployer plan constitutes a "transaction" to "evade or avoid" withdrawal liability, the Third Circuit has radically departed from the previously settled consensus of statutory interpretation of the Act and has disrupted the settled expectations of thousands of employers and the unions who have relied on that interpretation.

The impact of the Third Circuit's holding on the collective bargaining process is by no means limited to the facts of this case, but has far reaching

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[5] In the ITU decision, an arbitrator found that the employer and the union were allowed to negotiate an agreement giving the employer the discretion to select the date of the employer's withdrawal without any Section 4212(c) ramifications, since the agreement was the result of *bona fide*, arm's length negotiations.

[6] Adding to this consensus, the Pension Benefit Guaranty Corporation (PBGC) has not issued any opinions suggesting that Section 4212(c) applies to *bona fide* collective bargaining agreements. *See* Petition at 21-22, n.8

effects. It is not at all uncommon for unions to negotiate reduced pension contributions or even the cessation of contributions altogether, in order to obtain alternative increases in wages or benefits, including increased severance payments in plant shutdowns.[7] If a collectively bargained agreement is deemed to be a "transaction" within the meaning of Section 4212(c) that can be disregarded whenever a principal purpose of the negotiation is to reduce withdrawal liability, then numerous other agreements, negotiated in good faith, would be subject to the same uncertain fate, including the following examples:

- An employer and union may agree to terminate participation in a multiemployer plan in favor of a single employer pension plan that provides enhanced pension benefits to the covered employees. Under the Third Circuit's interpretation of Section 4212(c), the multiemployer plan may disregard the collectively bargained agreement if a principal purpose thereof is to avoid or minimize withdrawal liability.

- An employer and union may seek to avoid a complete withdrawal from a multiemployer plan by agreeing to continue the employment of some of the workers covered by the multiemployer plan, even where such diminished employment results in a "partial withdrawal" under Section

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[7] The Pension Protection Act of 2006 limits the ability of bargaining parties to reduce or eliminate contributions to financially troubled multiemployer plans. *See* 29 U.S.C. § 1082(d)(1)(A) and (f)(4)(A).

4205 of MPPAA. According to the Third Circuit's holding, such agreements, which obviously benefit employees and are expressly authorized by the Act, would nevertheless be subject to being disregarded by the multiemployer plan, due to the parties' intent to avoid a complete withdrawal (and associated withdrawal liability). Faced with this prospect, employers will certainly have less incentive to keep their workers employed in distressed business situations.

- A distressed employer may seek through good faith union negotiations to substitute welcome increases in wages or alternative benefits in exchange for ceasing its obligation to contribute to a multiemployer pension plan much earlier in the plan year than occurred in the present case.[8] The plan may have no unfunded liability at that time, but the employer may be concerned that current economic conditions will lead to withdrawal liability in a future year. According to the Third Circuit's holding, the employer's anticipation of withdrawal liability (and the employer's desire to avoid such liability) may subject it to the sanction of Section 4212(c).

- A distressed employer may locate a potential buyer of the employer's assets who agrees to continue the employment of some of the employer's employees and to continue contributions to the multiemployer plan (albeit at

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[8] The amount of withdrawal liability is a snapshot that applies for an entire year. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417-19 (1995).

a greatly reduced rate). If the amount or existence of withdrawal liability could be affected by the timing of the sale, neither the selling employer, the union, nor the potential purchaser can know whether the plan will disregard this "transaction" under the Third Circuit's ruling, making it less likely that the sale can be completed and the employees' jobs saved.

- Section 4207 of MPPAA expressly allows employers to abate their withdrawal liability after a complete withdrawal by resuming contributions to the multiemployer plan at a reduced level. Again under the Third Circuit's holding, if a principal purpose of an employer's agreement to resume contributions to the plan is to reduce or eliminate its withdrawal liability, then the employer's action would apparently violate Section 4212(c) and be disregarded.

According to the Third Circuit's decision, each of these agreements, which obviously benefit employees and are expressly authorized by MPPAA, would nevertheless be subject to being disregarded by multiemployer plans. Faced with this prospect, employers will certainly have less incentive to negotiate good faith agreements with their employees' unions that might keep more workers employed but might also reduce or avoid withdrawal liability.

Many other legitimate collective bargaining scenarios can be suggested by which employers and unions often agree for many legitimate reasons to cease the employer's obligations to contribute to a

multiemployer pension plan at a time when withdrawal liability can be avoided or minimized. Until now, such good faith bargaining was both permissible and protected by the mandatory bargaining provisions of the National Labor Relations Act and settled judicial understandings of MPPAA. The Third Circuit's holding upsets this consensus and throws into uncertainty the right of employers and unions to bargain in good faith over the employer's pension contributions, a mandatory subject of bargaining under the NLRA. This Court should grant the Petition and restore the previous consensus view of the application of MPPAA to *bona fide* good faith bargaining agreements.

B. The Third Circuit's Decision Will Undermine Legitimate Financial Planning Efforts Of Unionized Businesses.

The Third Circuit's unprecedented expansion of the "evade or avoid" provision of Section 4212 not only threatens to disrupt the collective bargaining process; the holding will also render thousands of unionized employers helpless to engage in the most basic financial planning. Any effort by such employers to anticipate or otherwise take into account their potential withdrawal liability from year to year, according to the Third Circuit, may allow their actions to be disregarded by plan trustees, because it will always be arguable that a principal purpose of the employer's subsequent actions will be to minimize withdrawal liability.

The disruptive effect of this aspect of the Third Circuit's holding can be readily seen by reviewing the past advice to employers routinely given prior to the Third Circuit's decision by legal experts and financial advisors regarding withdrawal liability. A broad consensus of advisors has long instructed employers to take withdrawal liability considerations into account in making important business decisions.

Among many such examples, readers of the Benefits and Pension Digest learned in 2007 that "[w]ithdrawal liability should be a major consideration in any business today,....Every company should know whether there is withdrawal liability, the rules, risks and costs associated with withdrawal liability, and the estimated amount for every plan to which it is a contributing employer."[9]

Similarly, the online management newsletter *Employment Law 360* has advised its business readers that "[e]very company in a multiemployer plan should find out if the plan is underfunded, and should certainly consider that underfunding before making any significant changes."[10] Individuals who own entities that contribute to a multiemployer pension plan have been further advised that they

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[9] Kenneth D. Stein & Kevin M. Williams, *Risk Management: Multiemployer Pension Plan Withdrawal Liability*, BENEFITS & COMPENSATION DIGEST 38, 42-43 (Oct. 2007) (recommending a series of steps to minimize future liability "as part of prudent risk management").

[10] Keith McMurdy, *Withdrawal Liability: A Hidden Hazard*, EMPLOYMENT LAW 360 (June 20, 2007), *available at* http://www.foxrothschild.com/Newsstand/News.aspx?id=4172.

"should engage in estate planning and investment activities bearing in mind the need to consider the potential withdrawal liability ramifications of those activities."[11]

Employers were similarly advised to "exercise due diligence to determine potential [withdrawal] liability each year in the regular course of business...."[12] Employers were further instructed to "closely investigate whether multiemployer plans are implicated in any anticipated sale or acquisition...."[13]

It is clear from reviewing this consensus of advice on which many employers have properly relied, that few ERISA experts understood Section 4212(c) to have any application outside the context of sham or fraudulent corporate transactions. Otherwise it would make no sense for employers to learn anything about their withdrawal liability prior to engaging in legitimate corporate activities, with or without collective bargaining. Indeed, the mere act of considering such potential withdrawal liability in connection with *any* particular business activity, and

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[11] Labor and Employment Advisory, David Laurent, "Pension Plan Withdrawal Liability Can Reach Estate Planning and Investment Activities" (Nov 2007), *available at* http://www.buchananingersoll.com/news.php

[12] *See Multiemployer Pension Plans in Mergers and Acquisitions*,C&G Review (Spring 2006), *available at* http://www.cohenlaw.com/news-articles-104.html.

[13] Kevin L. Wright, *Its Baack: The Reemergence of Withdrawal Liability* (August 2005), *available at* http://www.littler.com/collateral/print/CF2C5BF9980D758015EBF61705DBB7B2.html.

certainly the act of considering ways to *minimize* such liability, under the Third Circuit's holding, will lead to questions as to whether evading or avoiding the liability was a "principal purpose" of the "transaction." *See Third Circuit Holds That A Transaction Triggering A Withdrawal Was Entered Into In Order To Avoid Withdrawal Liability*, 15 ERISA Litig. Rep. 13 (Oct.-Nov. 2007).

The Third Circuit's unprecedented holding even contradicts published actions of the multiemployer plan representatives, some of whom have announced improvements in their funding status and have invited employers to take advantage of new withdrawal opportunities. For instance, the Employer Chairman of the Western Conference of Teamsters Pension Fund recently celebrated the Trust's funding status and announced to participating employers that "the Trust no longer has an unfunded vested benefit liability (UVBL). This means that there is no withdrawal liability for employers who withdraw from the Plan in 2006."[14].

The Third Circuit's reading of MPPAA thus appears to be divorced from the realities of the business world. Indeed, if the court's holding is not corrected, then employers will be required to make critical financial decisions without giving any consideration to potential liabilities in the millions of dollars, "flying blind" as it were. As is further

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[14] Bernard T. Eilerts, Employer Chairman, Western Conference of Teamsters Pension Trust, "Chairman's Announcement to Participating Employers," (Nov. 13, 2006), *available at* http://www.wctpension.org/employers/improved_funding.html.

discussed below, Congress could not and did not intend such a draconian result.

C. The Third Circuit's Decision Contravenes Congressional Intent.

As the Ninth Circuit properly recognized in *Cuymaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, supra*, 827 F. 2d at 499, Congress never intended Section 4212(c) to be applied in the manner adopted by the Third Circuit. Rather, it is clear that Congress intended by this provision merely to prevent unscrupulous employers who were already subject to withdrawal liability from engaging in sham restructuring transactions to escape their liability. Thus, the sponsors of MPPAA explained their intent as follows:

> [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability. Furthermore, we intend that the term "employer" be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through

> transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer – or for that matter any employer contributing to a plan will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980) (statement of Rep. Thompson).

Equally explicit was the following statement by Senator Williams:

> [W]e intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form or control, or through transactions which are less than bona fide and arms length. Hence, for example, a building and construction industry employer contributing to a plan – will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. S11672 (1980).

It is also worth noting that Senator Trent Lott discussed the legislative history of MPPAA on the Senate floor in introducing a bill to amend certain procedural rules relating to withdrawal liability in 2003. At that time, Senator Lott correctly described the previous legislative history as follows:

> MPPAA provides that a former employer or former member of a controlled group can still be liable if "a principal purpose" of the business separation transaction was "to evade or avoid" withdrawal liability. The legislative history indicates that the "evade or avoid" provision was designed to prevent unscrupulous employers from dumping a distressed subsidiary in order to evade or avoid withdrawal liability.

149 Cong. Rec. S14809 (2003).

The Third Circuit expressly declined to consider MPPAA's legislative history because of an erroneous belief that the language of Section 4212 (c) is "unambiguous." According to the Court, "The text in no way suggests that it only applies to sham or fraudulent transactions." Pet. App. 27a. The Third Circuit's reading of the text, however, ignores alternative business definitions of its terms. As should also be evident from the conflicting readings of other authorities, the meaning of Section 4212(c) is not as "plain" as asserted by the Third Circuit.

Certainly, each of the key terms of the provision, "transaction," "evade," and "avoid," is capable of multiple definitions other than those selected by the Third Circuit from the American Heritage Dictionary.[15] A commonly used "business

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[15] The Third Circuit cited no authority for its selection of the American Heritage Dictionary (among many possible dictionaries) as the authoritative source for defining statutory

dictionary" contains no less than five different definitions of "transaction," most of which involve the exchange of money or goods between a buyer and seller. *See* www.businessdictionary.com/definition. The business usage of the term "transaction" does not appear to apply to a negotiated decision by an employer and a union to cease contributions to a pension plan in connection with a plant shutdown.[16] Similarly, "evasion" is defined in common business parlance as "escapement from a liability or obligation through trickery or illegal means, such as tax evasion." *Id.*[17]

In the present case, there are no allegations that an exchange of goods between a buyer and seller was involved in the Petitioner's negotiations

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language. *See* Pet. App. 19a-20a. The Third Circuit's citation to the American Heritage definition of "transaction" is also incomplete, ignoring three alternative definitions, including the following: "2. Something transacted, especially a business agreement or exchange. **3.** Communication involving two or more people that affects all those involved; personal interaction. **4.** transactions A record of business conducted at a meeting; proceedings."

[16] According to BusinessDictionary.com, in the context of a commercial transaction, the term "transaction" requires three elements that are not present in collective bargaining: (1) a transfer of goods or services for money; (2) a transfer of title between a buyer and seller, and (3) a transfer of exchange rights between the parties. *Id.*

[17] In other statutory contexts, the concept of an "evade or avoid transaction" has been held to refer to a sham transaction usually involving a third party. *See UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 201 B.R. 163, 174 (S.D. W. Va. 1996) (interpreting the identical language of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§9701-9722).

with its employees' union representative. Nor was there any allegation of trickery or illegal means, as called for by the above definitions of "evasion or avoid." Given the complexity of MPPAA and its specific application to the business community, it is much more likely that Congress intended to use definitions that the business community would understand, rather than the language of an ordinary dictionary. In any event, the Third Circuit erred in reaching the conclusion that the language of the statute could be characterized as "plain" in the absence of a statutory definition, without any apparent consideration of the consequences to the business world.

Unless corrected by this Court, the Third Circuit's myopic reading of MPPAA will lead directly to the absurd and counterproductive results discussed above. The Third Circuit's decision also creates numerous conflicts within MPPAA itself and between MPPAA and the National Labor Relations Act, as has also been shown above. None of these difficulties arise from the Ninth Circuit's narrower reading of the Act, which reflects the consensus view of ERISA advisors and the business community for the past two decades and is much more consistent with the documented expressions of Congressional intent.

For each of these reasons, the Petition should be granted so that this Court can resolve a conflict that distorts and upsets the settled understanding of MPPAA, to the likely detriment of thousands of employers, unions and employees.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for Writ of Certiorari should be granted.

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